

In the case before us the respondent was convicted for trafficking in a large amount of heroin for a monetary motive and out of sheer greed. We find no extenuating circumstances that would justify a classification of this case as most exceptional and we therefore find no justification for the sentence of life imprisonment imposed."

In the present case the total amount of heroin involved was more than hundred grammes (100 gm.). I did not think the mitigating factors about the family of the accused *i.e.* an aged father and bedridden mother and two infant children, were extenuating circumstances. For the above reasons I sentenced the accused to death.

Sentenced accordingly.

Solicitors: R. Rajasingam & Co.

PUBLIC PROSECUTOR v. LEE TIN BAU

[O. Cr. J. (Gunn Chit Tuan J.) July 24 - 27, 30, August 29 & September 11, 1984]

[Selangor - Criminal Trial No. 3 of 1982]

Criminal Law and Procedure - Charges under s.57 of the Internal Security Act 1960 - Whether court has power after hearing the evidence to amend charges to charges under the Firearms (Increased Penalties) Act, 1971 and the Arms Act 1960 - Powers of Attorney-General - Federal Constitution, art. 145(3).

Administrative Law - Attorney-General - Powers of - Discretion in his capacity as Public Prosecutor to decide charges - Federal Constitution, art. 145(3).

In this case the accused was charged with offences under section 57 of the Internal Security Act, 1960. At the end of the prosecution case the learned trial judge called on the accused for his defence and after hearing his defence he found that he had not raised any reasonable doubts on the truth of the prosecution's case. Counsel for the accused requested the court to amend the charges to charges under the Firearms (Increased Penalties) Act, 1971 and the Arms Act.

Held : (1) as the law stands it must be left to the discretion of the Attorney-General in his capacity as Public Prosecutor to decide what charges to bring against anyone found in possession of firearms or ammunition and in the exercise of his discretion and in good faith, never to charge any person under Section 57(1) of the Internal Security Act whose case does not come within the legislative intent and purpose of that Act;

(2) in this case the court was satisfied beyond reasonable doubts that the accused was guilty of the offences charged and convicted him accordingly.

Cases referred to:

- (1) *Public Prosecutor v. Lau Kee Hoo* [1983] 1 M.L.J. 157, 161.

- (2) *Teh Cheng Poh v. Public Prosecutor* [1979] 1 M.L.J. 50.
- (3) *Ang Eng Chan v. Public Prosecutor* [1978] 1 M.L.J. 201.
- (4) *Re Tan Boon Liat* [1976] 2 M.L.J. 83, 85.
- (5) *Johnson Tan Han Seng v. Public Prosecutor* [1977] 2 M.L.J. 66, 71.
- (6) *Powell v. Kempton Park Race Course Company* [1899] A.C. 143, 185.
- (7) *Public Prosecutor v. Chai Yee Ken* [1977] 1 M.L.J. 167.
- (8) *Public Prosecutor v. Tan Ah Hock* Penang Criminal Trial No. 3 of 1982 (unreported).
- (9) *Connelly v. Director of Public Prosecutions* [1964] 2 All E.R. 401.
- (10) *Director of Public Prosecutions v. Humphrys* [1976] 2 All E.R. 497, 527.

CRIMINAL TRIAL.

Karpal Singh for the accused.

- D *Miss Tee Hong Geok* (Deputy Public Prosecutor) (*Miss Lee Ooi Kuan* with her) for the prosecution.

Cur. Adv. Vult.

- E **Gunn Chit Tuan J.:** The Public Prosecutor decided to prosecute one Lee Tin Bau (the accused) under the Internal Security Act, 1960 (ISA) on the following charges:-

"First Charge:

- F That you, on January 8, 1982 at about 12.20 a.m. at No. 51, Jalan SS. 18/1, Subang Jaya, in the District of Petaling Jaya, in the State of Selangor, within a security area as proclaimed by the Yang Di Pertuan Agong (vide Proclamation P.U.A. 148 of 1969 dated 15.5.1969) without lawful authority, did have in your possession, to wit two pistol revolvers SMITH AND WESSON 6 chambers .38 Special No. 77720 and RUBBER POLICE SERVICE SIX .38 Special Cal. 6 chambers without lawful excuse, and that you have thereby committed an offence punishable under Section 57(1) (a) of the Internal Security Act No. 82/60.

Second Charge:

- H That you, on January 8, 1982 at about 12.20 a.m. at No. 51, Jalan SS. 18/1, Subang Jaya, in the District of Petaling Jaya, in the State of Selangor, within a security area as proclaimed by the Yang Di Pertuan Agong (vide Proclamation P.U.A. 148 of 1969 dated 15.5.1969) without lawful authority, did have in your possession to wit, (31) rounds of ammunition without lawful excuse, and that you have thereby committed an offence punishable under Section 57(1)(b) of the Internal Security Act No. 82/60."

The prosecution adduced evidence, which was not inherently incredible, to show that on January 7, 1982 at about 10.00 p.m. a police party led by Inspector Abdullah bin Abdul Karim

(P.W.3) went to Jalan Raja Laut where they laid an ambush and arrested two male Chinese and a female Chinese as they were about to enter a car No. WAE 1572. One of the two male Chinese arrested was the accused whilst the other two were his wife called Lee Soon Chin (D.W. 2) and one Low Goh Sang. At the time of their arrest the accused and his wife told the police that they resided at 60A, Jalan Raja Laut, but Inspector Abdullah told them that 60A, Jalan Raja Laut was the address of a hotel and asked them to produce the keys to their house. The accused then produced a bunch of keys (exhibit P. 16) from the glove compartment of his car, and the inspector questioned him and his wife about the keys and told them that they did not reside at 60A, Jalan Raja Laut but in Subang Jaya. Apparently the police knew that they were residing at Jalan SS. 18/1, Subang Jaya, because they had been trailing the accused's car for about a week prior to their arrest. The inspector then sent the accused's wife to the police station at Jalan Travers in the company of two police constables whilst he together with Detective Sgt. Khoo Chin Tee (P.W. 7), DPC Ghazali bin Mahfudz (P.W. 10) and the accused proceeded to Subang Jaya in the accused's car. On the way there the accused admitted to the police that he resided in Subang Jaya and also told them that two of his friends called Ah Fatt and Kar Toon sometimes squatted with him there. They then went back to Jalan Travers to get the two police constables called P.C. Amsah and P.C. Abdul Kadir before proceeding to Subang Jaya again. On arrival there at about midnight, the accused was asked about the keys of the house which he had given to Inspector Abdullah earlier on. After the accused had shown them the specific key to open the front door they entered the house together with him. A search was then conducted and nothing incriminating was found in the master bedroom but in the second bedroom shown on the right of a photograph marked exhibit. P. 17B, the police found a mattress on the floor without any bedsheet. There was also a hanging cradle without a sarong, some clothings and bags. In the third bedroom shown on the left of exhibit P. 17B there was a plastic almeirah, some clothing hanging on a clothes line and various other things as shown therein. In front of the plastic almeirah was a brown brief case (exhibit P. 2). When the accused was asked who was the owner of P. 2 he said that it belonged to Ah Fatt. He was asked to open it but said that he could not open it as it did not belong to him. Inspector Abdullah then instructed Detective Sgt. Khoo to open it. Detective Sgt. Khoo was able to open it after sometime when he turned the

A combination lock down to zero. Inside P. 2 were two clutch bags, one black and the other brown in colour. Inside the brown clutch bag (exhibit P. 3) was a Police Service Six 0.38 revolver with no bullets in it (exhibit P.4) but inside a compartment of the brown clutch bag (P.3) were two Dunhill cigarette boxes (exhibit P.5) and a pair of handcuffs (exhibit P.6). Inside the two Dunhill boxes were 19 and 12 rounds of ammunition. In the black clutch bag (exhibit P.7) there was a Smith & Wesson 0.38 revolver No. 77720 (exhibit P.8). When P.W.3 inspected the compartments of the brief case (P.2) he also found a Malaysian passport belonging to the accused (exhibit P.9) and inside the passport was a Kee Clinic card (exhibit P.10) issued to the accused by a Dr. Kee Chia Puang of Johor Bahru (P.W.2). When the accused was shown the said passport and clinic card he just kept quiet. There was also a plastic bag (P.14) in which there were some photographs of the accused and his wife (P.15). The accused was then taken back to the master bedroom for further interrogation until 5.00 a.m. before Inspector Abdullah and DPC Ghazali took him back to the Jalan Bandar Police Station.

On February 9, 1982 the investigating officer ASP Ramli bin Yusuf (P.W.1) handed over the revolvers and ammunition to the police armourer (P.W.6) who after examination confirmed that both revolvers and the ammunition were serviceable.

Amongst the other witnesses also called by the prosecution were two convicts now serving their prison sentences. One of them was called Ng Seng Chai (P.W.3) who identified the accused and said that his friends sometimes called him Ah Fatt or Or Ngeow (in Hokkien meaning black cat). He has known the accused since the middle of 1981 when he was his neighbour at Taman Sri Petaling, but has never rented a room from the accused at Subang Jaya. He did not know the accused's address at Subang Jaya nor has he ever been there. When he was shown the brief case (P.2) and the two revolvers (P.4 & P.8) he said that he had never seen them before and that they did not belong to him. Under cross-examination P.W.8 admitted that he was living with a woman and had a child, who was a few months old in 1982 but he denied that he was staying in a back room in the accused's house in 1982. He said that he has not visited the accused there nor has his woman's mother ever stayed there. In 1982 he was staying in Pulau Ketam with one Kar Toon, who was his friend, at an unnumbered house and had committed the same kidnapping

offence with him. Kar Toon's real name was Khoo Teck Lam (P.W.9). That witness told the court that he did not know the accused or his name. He had not seen him before nor has he been to Subang Jaya.

At the end of the case for the prosecution there was *prima facie* case against the accused on both charges and Mr. Karpal Singh for the defence, as an officer of the court, appreciated that as there was a case for the accused to answer, judicial time need not be wasted in making a submission at that stage. I therefore proceeded to call on the accused to enter on his defence in accordance with regulation 13 of the Essential (Security Cases) (Amendment) Regulations, 1975. After the three alternatives had been explained to the accused he elected to give evidence on oath. He said that he was a gambling den operator who resided at house No. 51 in a certain road — the number of which he could not remember — in Subang Jaya. He was staying with others including his wife and did not have any children at that time. There were three bedrooms in the house and he stayed in the big master bedroom. The other bedrooms were rented out to a tenant called Ah Fatt, his wife and daughter and occasionally Ah Fatt's mother-in-law who looked after his child. He identified Ah Fatt who was one of the prosecution witnesses called Ng Seng Chai (P.W.8), and said that Ah Fatt stayed in his house for about 18 to 19 days. He also said that when Inspector Abdullah searched his car at the Jalan Bandar Police Station the latter recovered from it a bunch of keys, a C.C.M. agreement for hire-purchase of the car, the car registration card, a Malayan Bank book, an international passport, a birth certificate, a gold-plated bracelet and some other documents. He denied that he ever told Inspector Abdullah that he stayed in Jalan Raja Laut and alleged that what the inspector had said was not true. He also told the court that when the police searched the third bedroom in his house, he saw the bag (P.2) in a corner of the room. The police did not do anything to the bag but searched for other things first and after that they took him back to the master bedroom. Fifteen minutes later a detective brought P.2 into his room and the inspector asked him whose bag it was. He told the inspector that the bag belonged to Ah Fatt. The inspector then pointed to two guns in P.2 and asked him whether they belonged to him and he said that the guns were not his, as the contents of the bag (P.2) belonged to Ah Fatt. He said that it was not true that the bag (P.2) was opened in the third room, and also alleged that the search lists (P.12

A and D.23) were not explained to him before he signed them. He also said that amongst the other documents recovered from the car were a guarantee for the car stereo, a driving licence and another lorry driving licence and there was also a gold chain with a pendant.

B Under cross-examination the accused first said that he commenced staying in Subang Jaya on December 25, 1981. Then he changed his evidence and said that he commenced staying there on December 18, 1981 and that Ah Fatt and his family moved in on December 19, 1981. On the day of his arrest Ah Fatt and his family were still staying in his house. Ah Fatt's mother-in-law helped the family to move in their furniture and stayed for three to four days. They had two mattresses and some bedsheets but no beds, cupboards or dressing table. But when he was shown the photographs marked exhibits P.17A-H the accused in reply to another question by the learned deputy said that the photograph marked exhibit P.17E shows Ah Fatt's collapsible plastic cupboard. When asked by the learned deputy why he had just said that Ah Fatt and his family did not have beds, cupboards or dressing table, he changed his evidence and said that Ah Fatt did have a collapsible cupboard. When he was shown the photograph marked P.17C he claimed that all the articles shown in it belonged to Ah Fatt but admitted that he was married on August 31, 1981. When challenged again by the learned deputy, he denied that the articles shown in exhibit P.17C belonged to him and his wife and that they were given to him for his wedding. He then told the court that the plastic bag (exhibit P.14) with their photographs in it (exhibit P.15) were not in the third bedroom. He claimed that they were in the master bedroom and alleged that the police must have taken those photographs from his room whilst he was in the lock-up and had put them in Ah Fatt's room. Under further cross-examination the accused, who had forgotten that he had earlier on told the court that Ah Fatt and his family were still staying in his house on the day of his arrest, changed his evidence again and said that when the police raided the house, Ah Fatt and his family had left one day earlier.

I The accused called his wife Lee Soon Chin (D.W.2) to give evidence for the defence, but after she was cross-examined by the learned deputy on her former statement made to the police (exhibit P.29) I found that her credit was impeached.

In his comments on the evidence adduced by

the prosecution, Mr. Karpal Singh pointed out that there was a likelihood that Ah Fatt and his wife had stayed with the accused because there was a cradle in the second room and the accused and his wife did not have a child at the material time. The court also ought to consider that the bunch of keys (P.16) recovered by Insp. Abdullah from the glove compartment was not included in the search list (D.22). Moreover the clothing found in the room where the brief case (P.2) was found were never produced. Counsel contended that had the clothing been produced, it was likely that they did not fit the accused as alleged by him although Inspector Abdullah had denied that he had asked the accused to try them. Counsel also contended that it was likely that the international passport and the clinic card belonging to the accused were found in the glove compartment of his car and not in the brief case as it was highly unlikely that the accused would have put such incriminating articles in the brief case, if it was his, together with the guns. Counsel finally pointed out that the evidence of Ah Fatt should be treated with caution as he was a self-confessed convict, and contended that as the evidence of the prosecution was unreliable, the court should seriously consider giving the accused the benefit of the doubt and acquit him.

On the other hand the learned deputy contended that the evidence adduced by the prosecution was clear and that all available evidence pointed to the fact that the accused was in possession of the arms and ammunition. The house, *i.e.* No. 51, Jalan SS 18/1, Subang Jaya, from where the exhibits were recovered, was admittedly rented by the accused who had the keys to the house, and with which the police party effected entry thereto. The brief case (P.2) containing the incriminating items were found in the third spare bedroom in which there was a plastic cupboard with some clothes. Next to the briefcase was a plastic bag containing photographs of the accused and his wife. There were also boxes containing the accused's wedding presents. Apart from those items there was no bed, mattress or baby's cot or even the barest necessities for a family of three in the third bedroom and the learned deputy contended that it was too much to expect the court to believe that a room alleged to have been rented out to others who had since left would still contain their belongings. She submitted that the exhibits recovered showed conclusively that the third spare bedroom was also used by the accused and also conclusively demolished any allegation or claim that the room was rented out to Ah Fatt whose real name was Ng Seng Chai (P.W.8). The learned deputy also pointed out that the evi-

A dence of Inspector Abdullah (P.W.3) regarding the recovery of the arms and ammunition as well as the international passport and Kee Clinic card in the name of Lee Tin Bau was corroborated by the evidence of Detective Sgt. Khoo Chin Tee (P.W.7) and D.P.C. Ghazali bin Mahfudz (P.W.11) on all material aspects. As regards the bunch of keys (P.16) the learned deputy pointed out that Inspector Abdullah had stated that the accused took him to his car and there handed over to him the bunch of keys. The inspector also recovered a gold chain and locket and a gold bracelet as borne out by the search list marked exhibit D.22 signed by the accused before the police took him to his house. The keys were taken by the police to the scene and that was why they were not entered in the search list marked exhibit D.22. Finally the learned deputy concluded that whilst the prosecution had established conclusively from the totality of the evidence adduced that the accused was in possession of the arms and ammunition in a security area without lawful excuse or lawful authority, the defence had not succeeded in casting any doubts as to the truth of the prosecution's case.

E Taking into consideration my observations of all the witnesses for the prosecution and the defence in the witness box, the evidence given by them before me in court, as well as the comments on the evidence advanced by both the learned counsel for the defence and the learned deputy, I found that the prosecution witnesses, with the exception of Ng Seng Chai (P.W.8), were witnesses of truth. In the case of Ng Seng Chai (P.W.8) I agreed with the learned counsel for defence that his evidence should be treated with caution, and that there was a likelihood that Ng Seng Chai *alias* Ah Fatt and his wife might have stayed with the accused for some days before the relevant date. But as the hanging cradle was without a sarong and there was no other evidence in the spare bedrooms of the belongings for a family of three, I found that on the date of the accused's arrest, Ng Seng Chai and his family were not staying there with him in his house. I also found that the accused was not a witness of truth and that his defence had not on the balance of probabilities raised any reasonable doubts on the truth of the prosecution's case. Although I did not believe the defence of the accused, I also did not consider that it might reasonably be true or was consistent with innocence.

However, before I found the accused guilty of the offences charged and convicted him, I had to consider a request by defence counsel to amend

the first charge to one under the Firearms (Increased Penalties) Act, 1971, and also to amend the second charge to one under the Arms Act, 1960. Counsel submitted that there was the following pertinent question for the court to consider, that is:-

"Has the Court the power to amend the charges against the accused from those under the ISA to ones under Section 8 of the Firearms (Increased Penalties) Act, 1971 and Section 8 of the Arms Act (Revised - (1978)) Act 206 respectively?"

It was the submission of counsel that the court has the power to do so and, having regard to the evidence adduced in the case, it should do so. However, he conceded that in view of the judgment of the Full Bench of the Federal Court in *Public Prosecutor v. Lau Kee Hoo*⁽¹⁾ delivered by Suffian L.P. (as he then was) it is now beyond dispute in the light of Article 145(3) and *Teh Cheng Poh v. Public Prosecutor*⁽²⁾ that the Attorney-General has complete discretion whether to charge a person under one or other law. But counsel also referred to *Ang Eng Chan v. Public Prosecutor*⁽³⁾ in which the Federal Court in a judgment delivered by Ong Hock Sim F.J. (as he then was) has held that for a conviction under section 58(1) of the Internal Security Act, there must be "proof of the circumstances to raise a reasonable presumption of intention to act prejudicially to public security". Counsel contended that to bring the present case within the preamble of the ISA there was a similar requirement for offences under section 57(1) (a) and (b) of the said Act. It was his submission that the prosecution therefore had to prove beyond reasonable doubt the following ingredients to sustain charges under section 57(1) (a) and (b) of the ISA:-

- (i) the person charged comes within the ambit and scope of the ISA;
- (ii) the possession or control was without lawful excuse;
- (iii) the area in which the person was found was a security area;
- (iv) he was in possession or control of the firearm or ammunition or explosive without lawful authority.

Counsel also pointed out that it should be observed that in both the saving sections of the proviso to section 57(2) and of section 57(3) a person carrying arms or ammunition should not have acted in a manner prejudicial to public security or the maintenance of public order. He then submitted that section 57 should be read as a

A whole and in the context of the entire Act and not in isolation and that his reading of that section in the context of the entire Act indicated that what the legislation had in mind when enacting section 57 was to create a penal offence for persons who acted in any manner prejudicial to public security and/or the maintenance of public order. That intent, he continued, was evident from a reading of the preamble to the ISA, which clearly reflects that it was for the suppression of subversion and terrorism that the ISA was enacted. Counsel concluded that there was ambiguity as to the meaning of "any person" in sections 57 and 58 of the ISA and that the preamble could be resorted to having regard to what was said by Abdooldader J. (as he then was) in a passage of his judgment in *Re Tan Boon Liat*⁽⁴⁾. It was his contention that reading the ISA as a whole and sections 57 and 58 in particular, the phrase "any person" therein might have the following two interpretations viz:-

- (a) All and every person;
- (b) Only those persons within the ambit of the ISA.

Before I refer to the other submissions of counsel for the defence, I must state here that I agreed with the learned deputy that the case of *Ang Eng Chan v. Public Prosecutor* can be distinguished because that was a case in which the Court was concerned with a charge under section 58(1) of the ISA the provisions of which are different from those in section 57(1) of the Act. Even reading section 57 of the Act as a whole and in the context of the Act I do not find any words therein which require the prosecution to also prove that a person charged under section 57(1) of the Act possessed a firearm etc. with the intention of acting in a manner prejudicial to public security and/or the maintenance of public order.

Mr. Karpal Singh also submitted that the interpretation of the phrase "any person" in the Federal Court's case of *Johnson Tan Han Seng v. Public Prosecutor*⁽⁵⁾ was wrong as there was ambiguity in it. In his judgment Suffian L.P. (as he then was) had said:-

"Here the enacting words of sections 57 and 58 ISA are very clear. They say 'any person' etc. not 'any subversive person' etc. and clearly the accused all come within the scope of the two sections."

That Federal Court's decision is of course binding on the High Court, and in any case I would,

with respect, agree with Suffian L.P. that the words "any person" are clear and I do not see any ambiguity in that expression. As there is no ambiguity there is therefore no need to resort to the preamble of the ISA in this case, and in this connection one should remind oneself of the following passage in the judgment of Lord Davey in the House of Lords's case of *Powell v. Kempton Park Race Course Company*⁽⁶⁾:

"There is, however, another rule or warning which cannot be too often repeated, that you must not create or imagine an ambiguity in order to bring in the aid of the preamble or recital. To do so would in many cases frustrate the enactment and defeat the general intention of the Legislature. It may well be in this and in other cases that the Legislature, taking the recited facts as the occasion of the enactment, has deliberately used larger words to prevent the same kind of mischief in other forms. In the present case I am bound to express my opinion, with unfeigned respect for those who think otherwise, that there is not any such ambiguity in the present Act as entitles a court to cut down or restrict the words of the enactment by the recital in the preamble."

Similarly in our present case, one cannot create or imagine that there is an ambiguity in section 57(1) of the ISA to enable the court to cut down or restrict the operative words of that sub-section of section 57 by the recital in the preamble of the Act.

Counsel also referred to *Public Prosecutor v. Chai Yee Ken*⁽⁷⁾ which was also a High Court trial of offences under section 57(1)(a) & (b) of the ISA, and in that case Abdul Hamid J. (as he then was) with whom I would respectfully agree, has clearly stated that it was not the duty of the prosecution to prove that the arms would be used for the purposes stated in the preamble of the ISA. But it was still counsel's submission that the learned judge in that case did not decide whether the accused came within the ambit and scope of the ISA and that the Public Prosecutor must if he chooses to charge a person under section 57(1) of the ISA, still adduce evidence to show that the accused came within the scope and ambit of the ISA, failing which, he submitted, the court has the power to amend the charges under section 158(i) of the Criminal Procedure Code, as I did in *Public Prosecutor v. Tan Ah Hock*⁽⁸⁾ (Penang High Court Criminal Trial No. 3/82), to charges under the Firearms (Increased Penalties) Act, 1971. In that case the Public Prosecutor's application for leave to appeal under section 50(3A) of the Court of Judicature Act, 1964, was disallowed and as there was no written judgment by any court and counsel has referred to it, I would take this opportunity to give the reasons for my decision in that case. The accused in that trial was also charged for

possession of a firearm and ammunition under section 57(1) (a) and (b) respectively of the ISA. I found on the evidence adduced by the prosecution that there was a *prima facie* case for him to answer on both charges and called him to enter upon his defence. After the three alternatives had been explained to him, the accused elected to give evidence on oath and told the court, *inter alia*, that after his arrest he gave a statement to an officer known as Tiger Lee on February 15, 1979, and informed him as to the circumstances regarding the articles recovered from him. He was, on February 23, 1979, charged for five offences, including three for armed robbery, and claimed to be tried. He further stated that after he had claimed trial, the same police officer induced him to plead guilty and threatened him with a charge under the ISA. He agreed to plead guilty to all the five charges and when the facts were given in the three armed robbery cases, the firearm recovered from him was mentioned by the prosecuting officer to have been used in the said robberies. He was sentenced to prison terms ranging from two to three years to run concurrently and was also given four strokes of the rotan. He was due to be released on October 27, 1981, but was, one week before his release, charged for the two offences under the ISA. Amongst the arguments raised by the learned counsel in that case were that the accused had been put in double jeopardy, had been prejudiced and embarrassed by reason of the delay on the part of the prosecution in preferring the charges after two years and seven months and in all the circumstances of the case the prosecution was oppressive and repugnant to the good administration of justice. Counsel in that case also referred to *Connelly v. Director of Public Prosecutions*⁽⁹⁾ in which the House of Lords enunciated the general principles and the test of applicability for the doctrine of *autrefois acquit*, and counsel stated that all their Lordships in that case agreed that a court has a general and inherent power to protect its process from abuse and that that power must include a power to safeguard an accused person from oppression or prejudice. Although the defence in that case, through cross-examination of the investigation officer, was able to show that the then OCCI, Penang, a Senior Asst. Commissioner of Police called Haji Omar would know the full facts of those cases, yet the prosecution chose not to call him as a witness but made him available to the defence. The defence did not call him as a witness, but after the accused had given evidence on oath, the prosecution also did not call the former OCCI Hj. Omar to rebut the evidence of the accused. In order to test the truth of the accused's evidence in

that case, I examined the charge sheet and noted that it supported his statement on oath that although he was arrested on February 8, 1979, for possession of the firearm and ammunition, he was not produced in court and charged for offences relating to them under the ISA until October 19, 1981. In all the circumstances of that case, I felt and considered that the prosecution of the accused in 1981, that is, nearly three years after his arrest was some evidence of *mala fides* on the part of the prosecution and amounted to an abuse of the process of the court. As I also considered that it was oppressive and prejudicial to the accused, I therefore took the unprecedented step to intervene by amending the charges and sought support in the following passage in the judgment of Lord Salmon in the House of Lords' case of *Director of Public Prosecutions v. Humphrys*⁽¹⁰⁾:-

"I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considered that as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved. For a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to which I have referred. I express no concluded view whether courts of inferior jurisdiction possess similar powers. But if they do and exercise them mistakenly, their error can be corrected by mandamus."

But I must agree with the learned deputy in this case that I had erred in that case by amending the second charge of possession of ammunition to a charge under the Firearms (Increased Penalties) Act rather than to charge under section 8 of the Arms Act, 1960. However the facts and circumstances of *Tan Ah Hock's* case are different from those in the present case, in which the accused was charged only two months after the date of his arrest, and there is no evidence of circumstances to show that he has been treated unfairly or oppressively as the accused was, in the other case. With respect, therefore, to the submissions of learned counsel, I therefore considered that the question posed by him need not be answered in this case.

No one need go beyond *Johnson Tan Han Seng's* case to find the authority that the Attorney-

A General has the power to discriminate between persons alleged to be in possession of firearms or ammunition and to charge them differently. I would again quote the following passage from the judgment of Suffian L.P. (as he then was) in that case:-

B "The Attorney-General is in touch with the police and other investigating agencies, and he has information not available to the courts and on which to base his decision whether or not to prosecute and if so on which charge."

C As the law stands it must therefore be left to the discretion of the Attorney-General in his capacity as the Public Prosecutor to decide what charges to bring against anyone found in possession of firearms or ammunition and, in the exercise of his discretion and in good faith, never to charge any person under section 57(1) of the ISA whose case does not come within the legislative intent and purpose of that Act.

E As far as this case is concerned, having considered very carefully the evidence adduced by the prosecution and the defence, I was satisfied beyond reasonable doubt that the accused was guilty of the offences charged and convicted him accordingly. I then proceeded to pass the only sentence provided under section 57(1) of the ISA, namely death.

Order accordingly.

Solicitors: *Karpal Singh & Co.*

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JASABENA SDN. BHD. v. BEH HENG POO & ANOR.

[O.C.J. (Edgar Joseph Jr. J.) July 7 & August 18, 1984]
[Penang — Originating motion No. 1 of 1984]

H

Practice and Procedure — Certiorari — Construction of words "entered for hearing" — Preliminary objection — Notice to opponent — R.H.C. 1980, O.53 r.1A & 2(2).

I

In this case the sole question for decision arising out of a preliminary objection taken by the respondents concerned the meaning and ambit of the phrase "entered for hearing" in O.53 r.2 of R.H.C. 1980. After leave has been granted, the motion under O. 53 r. 2(2), must be entered for hearing within 14 days. In this case, the application for *certiorari* was fixed for hearing 52 days after leave was obtained.

Held: for purposes of O. 53 r. 2(2), "filing" corresponds to "entry" so that there is sufficient compliance